PP

v.

MOHAMMED SULAIMAN SAHULHAMMED

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG JC
[CRIMINAL TRIAL NO: 45-08-2009-II]
17 MAY 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in ketamine - Possession - Possession without knowledge - Mens rea - Whether established - Drugs hidden in television set carried by accused - Accused's conduct and demeanour not conclusively showing he had knowledge of drugs - Whether mistake in description of drug and weight fatal to prosecution*

CRIMINAL PROCEDURE: *Mens rea - Possession without knowledge - Drug trafficking charge - Drugs hidden in television set carried by accused - Accused's conduct and demeanour not conclusively showing he had knowledge of drugs*

The accused, an Indian national, was approached by customs officers after he retrieved a box, tied with rope, wrapped in bubble wrapper and bearing the name 'Samsung' on it, from the luggage conveyor belt at the Kuching International Airport where he had arrived *via* Kuala Lumpur after having left New Delhi a day earlier. The customs officers found a television set inside the box. However, it failed to function when switched on. Suspecting something amiss, the officers called for the assistance of their narcotics unit, which arrived with two sniffer dogs. Upon sniffing the box, the dogs showed positive reaction to the presence of drugs. The back of the TV set was then opened and the officers found within it 46 plastic packets containing a white substance later certified by the chemist to be 5,796g ketamine. The accused was originally charged with trafficking in 1,018kg methamphetamine. The charge was later amended to trafficking in 5,796g ketamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The mistake in the description of the drug and weight had come about because one of the customs officers had tested the seized drugs using a test kit for detecting the presence of methamphetamine.

Held (acquitting and discharging the accused without calling for his defence):

(1) It could not be said with certainty that the conduct of the accused that day was only capable of one inference *ie*, that he had knowledge of the drugs. (para 37)

(2) The prosecution's evidence made the position of the accused's supposed knowledge of the drugs equivocal. One witness testified that the accused was shocked and surprised when the drugs were found inside the TV set. Another was unwilling to conclusively say the accused was obstructing their examination of the TV set. (para 37)

(3) The conduct and demeanour of the accused at the material time were capable of two inferences - one, that he was aware of the drugs hidden in the TV set and the other, not. It was the duty of the court to draw the inference that favoured the accused. (paras 36 & 38)

(4) All throughout the examination of the TV set by the customs officers, and even when he was stopped, the accused did not exhibit any untoward behavior which aroused the suspicion and caused an inference that he was carrying anything illegal with him. The drugs were also not found in such a position or place where he could not have but known that it was drugs that he was carrying. (para 40)

(5) The slip and the difference in the drugs stated in the original charge and the amended charge had been properly explained. The slip was not fatal as the mistake was not between a substance which was a non-drug with a substance that was. The definitive evidence on the type of drug lay with the chemist and not the customs officer. (para 18)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Chwen Kong v. PP [1962] 1 LNS 22 HC ***(refd)***
Chan Kin Yu v. PP [2006] 3 CLJ 853 CA ***(refd)***
Ong Ah Chuan v. PP & Another Appeal [1980] 1 LNS 181 PC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Samundee Devan Muthu Kerishnan v. PP [2010] 3 CLJ 269 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(4)
Dangerous Drugs Act 1952, ss. 28, 39B(1)(a)
Evidence Act 1950, s. 8

For the prosecution - Nor Ariffin Hisham DPP
For the accused - CM Sundram; M/s CM Sundram & Co

Reported by Ashok Kumar

JUDGMENT

Rhodzariah Bujang JC:

[1] The accused is an Indian national and holder of Indian passport No. E6589638. He arrived at Kuching International Airport on flight MH2504 from Kuala Lumpur at 10.15am on 17 March 2009. He had earlier taken a New Delhi - Kuala Lumpur flight MH191 on 16 March 2009. Upon his arrival at Kuching International Airport, he was observed by an officer of the Royal Malaysian Customs, Mohamed bin Taini, taking a box with the name "Samsung" on it from the conveyor belt. The box was tied with a rope and wrapped in bubble wrapper. The accused put it on a trolley and it was then that Mohamed bin Taini approached the accused and asked him to wheel the trolley to the customs examination counter not far from the said conveyor belt.

[2] The box was opened by the accused with a knife supplied by another officer of the Royal Malaysian Customs, Bidin bin Lotot. Inside the box was a television set ("TV set" and marked as exh. P29). Once it was placed on the counter, the suspicion of Bidin bin Lotot was aroused when he saw a black spot on the screen of the TV set. Mohamed bin Taini then attempted to switch on the TV set but found that it was not functioning. This led assistant superintendent of customs, Simon Titik to call the Narcotics Unit for help. The TV set was then put back into the box, placed on a trolley and pushed by the accused to the customs office at the airport whilst waiting for the arrival of the customs narcotics unit team.

[3] The narcotics unit team comprising of customs officers, Stephen Pina, Petrus Amin and Mandrid arrived. Sniffer dogs handled by Petrus Amin and Mandrid, called Tab and Carlos were led to the box which was at that time placed behind the opening of the conveyor belt (ie, outside of the arrival hall). The sniffing process had to be done there because no dogs were allowed at the arrival hall.

[4] When both dogs showed positive reaction to indicate the presence of drugs, the TV set was again placed inside the box and taken to the customs office.

[5] This time, the accused was given a screw driver to open up the back of the TV set and with its inside exposed, Stephen ak Pina discovered a small part of it which had been cut open but glued back. The opening was covered with a yellow sticker marked 'caution' (exh. P38) and underneath the sticker was a slab (exh. P37). In the opening, Stephen ak Pina first found black plastic bags inside and when

these bags (exhs. P34(A) and (B)) were taken out, 46 plastic packets containing white crystalline substances (exh. P28(1) - (46)) were found stuffed inside the TV set.

[6] The 46 plastic packets were then labelled B1 to B46 and the date, 17 March 2009 was written on all the packets. Stephen ak Pina also signed on the said packets. On the same day at 4.10pm. the accused and all the exhibits seized ie, the TV set in the box and the 46 packets of white crystalline substance were handed over to the investigating officer by Stephen ak Pina. The investigating officer, Misell ak Rondeng also countersigned on all the 46 packets of the white crystalline substances and a handing over note (exh. P33) in respect of these packets and the other exhibits seized was signed by both officers.

[7] The 46 packets of white crystalline substance were then sealed and kept by Misell ak Rondeng in a silver metal brief case and the brief case was put in an iron safe in his office before he sent them to the chemist on 19 March 2009.

[8] The chemist, Ms Rami Gendang (PW1) did an analysis of the white crystalline substance and found them to contain 5796 grammes of ketamine. Her report is tendered as exh. P24(A). The same 46 packets were then returned to Misell ak Rondeng on 29 April 2009 at 1600 hrs after being sealed with the chemist seal. The seals of the chemist were only broken in the court room when she opened the big package containing the 46 packets in order to identify them. There was also evidence from Ms Lau Ngan Lee, of Samsung Electronics Display (M) Sdn Bhd, that based on the serial numbers of the TV set supplied to her, the TV set was produced by their plant in India. Thus, the accused was charged before me on an amended charge of trafficking in 5796 grammes of ketamine under section 39B(1)(a) of the Dangerous Drugs Act 1952.

[9] The above represents the salient evidence adduced by the prosecution against the accused.

A *Prima Facie* Case

[10] Section 180(4) of the Criminal Procedure Code provides that a *prima facie* case is made out against the accused when the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant his conviction.

[11] The ingredients of the charge of trafficking which the prosecution must prove are these:

(i) The said drug was found in the possession of the accused.

(ii) He had knowledge that the 46 packets contained the drug, ketamine. A

(iii) He was trafficking in the said drug.

[12] Case laws are replete with the task which the court must undertake in order to find whether the prosecution has proven a *prima facie* case against the accused. It is that I must subject the evidence adduced by the prosecution to a maximum evaluation. At this stage, the credibility and reliability of the evidence presented in court must be determined to consider if the ingredients as outlined above have been met. Once this evaluation has been done, I am to ask this question: If the accused remains silent when I call for his defence, is the evidence sufficient to convict him on the charge of trafficking? (see Federal Court's case of *Balachandran v. PP* [2005] 1 CLJ 85 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457). Before going into an evaluation of the evidence with respect to the ingredients as aforesaid, I would just deal briefly with a procedural point brought up by Mr CM Sundram, the assigned counsel for the accused. B C D

Procedural Point

[13] He submitted that the amended charge was not read to the accused before the trial commenced on 24 November 2009 and his plea was not taken before the prosecution called its witnesses. On account of this failure, he submitted that I must now acquit and discharge the accused immediately. E

[14] With respect, I am unable to agree with him. The amended charge was read to the accused in Tamil by an interpreter provided by the customs department as we do not have a Tamil speaking interpreter on 12 August 2009. He then pleaded not guilty to the charge. He could not have pleaded guilty to the charge anyway because the penalty for the offence is death. He cannot also complain about the Tamil interpreter from customs department because no prejudice was caused to him since he did not plead guilty. If he had pleaded guilty to some lesser offence, perhaps his counsel can accuse the prosecution of being biased or of undue influence and the court of not being vigilant enough to protect his client's rights against the might of the prosecution. Nothing of that sort happened here. The complaint is therefore unjustified. F G H

[15] I am moved to consider another submission point of Mr CM Sundram in relation to the amended charge and it is that in the original charge against the accused, when he was first remanded in the magistrate's court, was for trafficking in 1.018 kilogrammes of methamphetamine, the charge was signed by Puan Fazillah Begum binti Abdul Ghani as Deputy Public Prosecutor, Sarawak. I

[16] When the case was transferred to the High Court, the amended charge signed by Encik Nor Ariffin bin Hisham as Deputy Public Prosecutor of Royal Malaysian Customs, the drug was changed to ketamine and the weight was 5796 grammes.

[17] Mr CM Sundram called the change of drugs from methamphetamine to ketamine as a 'strange phenomena'. In fact the chemist herself when asked, was unable to explain how the drug methamphetamine can change to ketamine. However, as the prosecution's case unfolded to its end, the 'strange phenomena' was explained. It was brought about by the initial testing done by Stephen ak Pina using the a test kit from Dipro Druglab for methamphetamine. He testified that when a line appeared at the segment on the test kit marked 'C & T', the drug is positive for methamphetamine but if the line at 'T' is blurred, it is negative for methamphetamine. He was mistaken, he said in this case for the line at 'T' was actually blurred and that was why he thought that the drug was methamphetamine. The test kit after its use was thrown away, said the witness.

[18] Now, is the slip here fatal? After some consideration, my answer is 'no'. This is because the mistake is not between a substance which is non-drug with a substance that is. The slip was in respect of the difference in the drug and the learned deputy prosecutor is right that the definitive evidence on the type of drug lies with the chemist and not the customs officer. The slip and the difference in the drugs stated in the original charge and amended charge has been properly explained and it is an explanation which I accept.

[19] I would move next to the ingredients of the offence and possession is the first crucial ingredient.

Possession

[20] It is beyond doubt that the box with the TV set was the checked in baggage of the accused, not only because he took it from the conveyor belt but because the baggage tag on it (exh. P9) and its counterfoil (exh. P10(a)) were found in his possession. His name and the flight numbers were also a perfect match.

[21] Against the submission of Mr CM Sundram, I also do not find any break in the chain of evidence in respect of the drugs found concealed in the TV set for except for a brief moment when the dogs were sniffing the box containing the TV set behind the opening of the conveyor belt, the accused was with the box containing the TV set at all times. Even during that brief moment, Mohamed bin Taini's evidence was that he was able to watch the sniffing process being done (by popping his head through the opening) even though the accused and him

were at the arrival hall. More importantly, however, the drug was not easily taken out or replaced as it was in the TV set and at that material time the TV set was not even opened yet. It was still tied with a string and securely wrapped in the bubble wrapper. The dogs were sniffing the box from the outside. Thereafter, as narrated earlier after the TV set was opened and the drugs were found, the security of the drugs until they were opened in court by the chemist was never compromised. Almost every step was accounted for and the signatures of both Stephen ak Pina and Misell ak Rondeng together with the date on the 46 packets, made the identification of the 46 packets as being the ones discovered in the TV set, analysed by the chemist and produced in court - airtight.

[22] Thus, I am satisfied that the evidence led by the prosecution show that the accused had possession of the drugs at that material time.

Knowledge Of The Drugs

[23] The evidence in the accused's favour was, he was cooperative throughout - from the moment he was asked to bring the TV box to Mohammed bin Taini for inspection right up to the examination by Stephen Pina and the handing over of all the exhibits and the accused to Misell ak Rondeng. All the relevant customs officers who gave evidence vouched for him in this respect - Mohamed bin Taini, Bidin bin Lotot, Petrus Amin and Stephen Pina.

[24] Very rarely is one able to prove knowledge by direct evidence except when there is a confession or an admission in a cautioned statement. It is very often a matter of inference, said Augustine Paul FCJ in the Federal Court of *Parlan Dadeh v. PP* [2009] 1 CLJ 717. It would be sufficient, held His Lordship, for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge of the prohibited substance.

[25] In this case what are these facts and the circumstances which could justify the inferences? It is the conduct of the accused, submitted the learned deputy public prosecutor.

Conduct Of The Accused

[26] When Stephen ak Pina was examining the TV set after its back portion was unscrewed by the accused and prior to discovering the drugs inside the TV set, the accused was seen by Petrus ak Amin, another customs officer present at the examination, to be standing very close to the TV set with one hand on the side of the table and the other on his waist and it looked to the witness ie Petrus ak Amin that the accused was trying to block Stephen ak Pina from finding the opening

inside the TV set. He then alerted Stephen ak Pina of the behaviour of the accused. Stephen ak Pina too testified that he felt himself obstructed by the presence of the accused at that time.

[27] Stephen ak Pina also testified that when the yellow sticker and slab were removed, he saw the plastic bags in the opening and took it out slowly, that's when the accused reached out and pulled roughly the other bag from inside the opening. All this showed knowledge, submitted the learned deputy public prosecutor and not, as cross-examined by Mr CM Sundram, a desire to assist the officers in their examination.

[28] Against this evidence however is the evidence of Petrus ak Amin himself who in cross-examination admitted that the accused did not in any manner obstruct the officers from examining the TV set and he also agreed to the suggestion of Mr CM Sundram that he had misconstrued the behaviour of the accused and thought that the latter was obstructing. (Page 64 of the notes of proceedings). When asked in re-examination what he meant by this statement, he answered,

> A: I only saw the accused's behavior so I informed the Senior Customs Officer about it.

Earlier in his examination in chief, Petrus ak Amin said when the drugs were discovered, the accused looked uneasy as if he was shocked and he looked worried (p. 63 of the notes of proceedings) and when he was asked in cross-examination by Mr CM Sundram,

> Q: When you said the Accused reacted as if he was shocked, did he also indicate surprise?
>
> A: Yes, shock is surprise.
> (page 65 of the notes of proceedings).

[29] Mr CM Sundram also submitted that given the size of the room where the examination was conducted, the number of customs officers in the room (at least ten) and the fact that the accused was asked to assist in unscrewing the TV set, he had to stand close to the TV set. So he had put to Stephen ak Pina that when the latter said that the accused was obstructing the examination of the TV set, it was only in his mind, Stephen's reply was,

> A: He should have moved away.
> (page 139 line 1 of the notes of proceedings).

[30] Stephen ak Pina did describe during the trial the size of the examination room by using the panels on the wall of the court room as a guide. It is not a big room - only about three panels (36 feet) in length and five panels in width and there were about six persons in it

at the material time. It is therefore quite reasonable that the accused had to be standing close by amongst the people inside the room at that time but except for the manner described by Petrus ak Amin, there seemed to be no overt act on the part of the accused which could be interpreted as obstructing the search in progress by the officers.

[31] It was put to Stephen ak Pina that the obstruction of the accused was only in his mind and his answer was,

> A: Yes, but at that time it increased my suspicion.
> (page 141 line 30 to page 192 line 1 of the notes of proceedings).

In re-examination, he was asked to explain why his suspicion was increased and his answer was,

> A: Because at that time I just get suspicious.
> (page 142 lines 20 - 21 of the notes of proceedings).

[32] Mr CM Sundram further submitted that in order for the accused's behavior to be called "obstruction", it must come under s. 28 of the Dangerous Drugs Act 1952 which provides as follows:

> Obstruction of inspection or search
>
> 28. Any person who:
>
> (a) refuses any officer authorized to enter or search access to any premises, or conveyance; or
>
> (b) assaults, obstructs, hinders or delays him in effecting any entrance which he is entitled to effect under this Act, or in the execution of any duty imposed or power conferred by this Act; or
>
> (c) fails to comply with any lawful demands of any police officer or officer of customs in the execution of his duty under this Act; or
>
> (d) refuses or neglects to give any information which may reasonably be required of him and which he has it in his power to give; or
>
> (e) fails to produce or conceals or attempts to conceal any book, document, dangerous drug, syringe, pipe, lamp, or utensil in relation to which there is reasonable ground for suspecting that an offence has been or is being committed against this Act; or
>
> (f) rescues or endeavours to rescue or causes to be rescued any things which have been duly seized; or
>
> (g) furnishes to any officer as true, information which he knows or has reason to believe to be false; or
>
> (h) before or after any seizure, breaks or otherwise destroys anything to prevent the seizure thereof, or the securing of the same,

A shall be guilty of an offence against this Act, and shall be liable on conviction to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or to both.

What the accused allegedly did of course did not satisfy the definition in s. 28 but is still relevant evidence to consider under s. 8 of the B Evidence Act 1950.

[33] The Federal Court in *Samundee Devan Muthu Kerishnan v. Public Prosecutor* [2010] 3 CLJ 269 has held that conduct of the accused under the said s. 8 must not be taken in isolation but together with the C circumstances of the case, citing *Chan Chwen Kong v. PP* [1962] 1 LNS 22.

Other Circumstances

[34] The learned deputy public prosecutor has alluded to the fact that D the box containing the TV set was securely wrapped by a company called Securewrap (India) Private Ltd, Dwarka, New Delhi in India as evidenced by the receipt from that company (exh. P44) found in the accused's possession. He also referred to the tax invoice from SC Shah & Co (P) Ltd, Chennai-2 (sort of a receipt) for the TV set which was E found with the accused and questioned why the accused would be carrying a broken down TV set with such receipts all the way from India except as evidence, if he were caught, that the TV set was legitimately from India. This, he submitted, despite the tax invoice being in another person's name and not that of the accused.

F **[35]** Further, the accused had been shown through his passport and the evidence of the immigration officer (PW5) to have entered Kuching twice before his arrest, so he must have been familiar with the security procedures at the Airport - hence his calm demeanour.

G Needless to say in order for possession to be incriminating of the accused, it must be a *mens rea* possession in that he must be aware of his possession, knows the nature of the thing he possesses and must have the power of disposal over it. (see the Court of Appeal's case of *Chan Kin Yu v. PP* [2006] 3 CLJ 853.)

H **[36]** I must be certain that all the above circumstantial evidence said to prove knowledge must point to only one inference - that he knew that he was carrying drugs which was hidden in the TV set. The Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 held that if the evidence adduced by the prosecution admits of two or more I inferences, one of which is in the accused's favour, it is the duty of the court to draw the inference that is favourable to the accused.

[37] With this authority in mind, I am unable to say with the certainty of mind that the conduct of the accused that day is only capable of one inference ie that he had knowledge of the drugs. The evidence of Peterus ak Amin as I have highlighted earlier has made the position of the accused's supposed knowledge of the drugs as equivocal - his shock and surprise as testified by the witness and this is further cemented by the unwillingness of Stephen ak Pina to conclusively say that the accused was obstructing their examination of the TV set. The mere fact that he was found in possession of the receipts from the two companies in India cannot in my view be used to infer his knowledge of the illicit content in the TV set.

[38] In other words, the conduct and demeanour of the accused at that material time were capable of two inferences - one he was aware of the drugs hidden in the TV set and the other, not. I am constrained by *Mohd Radzi*'s case *(supra)* to say that he was not.

[39] I have arrived at this conclusion fully aware of the decision of the Federal Court in *Parlan*'s case *(supra)* as my attention to it was drawn by the learned deputy public prosecutor but the facts in that case are distinguishable from the present one. In *Parlan*'s case, *(supra)* the appellant looked shocked and stunned upon being approached by the police and the Federal Court held against the background of the other evidence presented at the trial that he knew what he was carrying. This other evidence was that the drugs were found tucked away in the front of the jeans worn by him. Further, Augustine Paul FCJ remarked that "the evidence of conduct in this case was not significant in view of the manner in which the appellant carried the drugs on his person from which it can be inferred that he had knowledge of the drugs in his possession ...".

[40] In this case before me, it must be remembered that all throughout the examination and even when he was stopped, the accused did not exhibit any untoward behaviour which would arouse the suspicion and caused an inference that he was carrying anything illegal with him. Thus, the distinguishing factors from *Parlan*'s case *(supra)* are firstly, his 'shock and surprise' was when the drugs were discovered inside the TV and secondly, the same were not found in such a position or place where he could not have but knew that it was drugs that he was carrying. To highlight the contrast, in *Parlan*'s case *(supra)* the fact that the drugs were found on his person - the reaction exhibited by the appellant when stopped by the police, one could only infer that he had knowledge of the drug whilst in this case that sole inference could not easily be made.

[41] As for the learned deputy public prosecutor's submission that the fact that the accused was caught with such a large amount of drugs so as to raise an inference that it was for the purpose of trafficking, I agree that such an inference can be drawn going by the authority of the Privy Council's case of *Ong Ah Chuan v. PP & Another Appeal* [1980] 1 LNS 181 which was also quoted by the Federal Court in *Parlan*'s case *(supra)*. But this is an inference to be drawn regarding the specific ingredient of trafficking; not knowledge and it only arises if I find that knowledge of the drugs had been proven in this case. I have not, so there is no utility in the cited case at all in this decision.

[42] For the reasons given above, I discharge and acquit the accused without his defence being called.